RAILWAY CHARTERS.

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The term railway charter, as used in this paper, embraces the enabling or permissive statutes under which the railways of the country do business. The charters granted in the various states before general railway incorporation laws had been enacted, were special laws relating exclusively to a particular enterprise. Railway companies organized under general laws secured what are variously known as articles of incorporation, articles of association, letters patent, etc., which are, in the old sense of the term, not charters at all. The earlier "charters" are acts of special legislation. The later "articles" are merely administrative acts based upon general laws.

With the exception of a few western states, in which general laws were passed at the very outset, the states began with special legislation and gradually drifted into general legislation. In many states the first general laws embodied all the salient features of the best special charters which had been previously granted in those states, while in a much smaller number the first general laws related to eminent domain, declarations of public utility, public aid, and kindred topics, leaving the chief provisions of the franchise to the special charter. The transition from special to general laws was usually extremely slow. In a large number of states this transition was encouraged by a system of abbreviating charters, the new charter containing only several sections relating to the organization, route, and other individual and local matters, with the provision

that the company thereby incorporated shall enjoy all the rights, privileges, and immunities previously granted to a certain other company. The logical outcome of this process was the enactment of a general law embodying the provisions of the charter by reference to which the newer charters had been abbreviated. However, the simple enactment of such a general law was not necessarily followed by incorporations under this law; for, again and again, special charters were granted—sometimes within a day or two—by the legislatures of a number of states, completely ignoring the general law. Of, perhaps, a score of railway companies authorized during the same session of the legislature, one-half might have organized under general, and the remainder under special laws. More than this. One of the great railway systems of the United States is to-day operated under a special charter, originally granted, twenty-five years before, for the construction of an insignificant local road which was never built, in spite of the fact that every state which this system crosses had at that time laws or constitutional provisions, or both, prohibiting the granting of special charters for railway purposes. In itself this may have been neither bad nor good, yet we are confronted by the fact that the spirit, if not also the letter, of the laws of these states was shrewdly evaded by the railway company in question.

The history of railway charters in the different states has been quite similar. Few, if any, states appear to have profited by the earlier experiences of sister states, but each in turn lived through all the successive stages of railway civilization from the stone-age up—or up to the stone-age, if, as has been asserted, this term characterizes the status of present railway legislation. Each

state—excepting a few of those in the west—had its crops of railway charters; and as the promoters moved westward from the Atlantic towards the Pacific, the charters were generally more loosely constructed through the omission of the more detailed, explicit, and often restrictive sections. Not a few charters were granted containing only from four to a dozen sections, while the best eastern charters contain from twenty or twenty-five to forty or more. If the states of the Northwest, for instance, had heeded the lessons of New York or Massachusetts, it is probable that the railway history of this country would have been different from what it is in many respects. In recent times, Japan in her railway legislation, has given us an illustration of what one state may learn from other states or countries. This suggests the splendid English custom, for illustrations of which we may turn to the railway laws of India, Canada, and the Australian Colonies, of carefully defining in the act itself the terms employed therein. American charters and general laws are full of terms which require definition in order to be understood. Instances could be cited where charters specify judicial or other officers for the performance of certain duties, which have neither legal nor constitutional existence in the state which granted the charters. This is only one of the many ways in which the greatest carelessness in the passing of railway charters by our legislatures is revealed. Yet, it would be rash to conclude that carelessness in granting charters necessarily resulted in the construction and operation of inferior railways, or in abuses characteristic of the business; although it is difficult to see why charters granted by the same legislature during the same week, for similar railways should contain widely diverse or antagonistic clauses.

An analysis of the contents of railway charters of the various states shows substantial uniformity in corporate powers, provisions relating to expropriation and to the size of shares, and certain police regulations. But here uniformity usually ceases. Of course, differences due to differences in the enterprises themselves ought to exist in the charters and laws, but it is one of the striking features of our railway history that both special and general laws may vary widely even though they apply to railways constructed and operated under essentially similar if not identical conditions. In the charters, the number of commissioners and directors appears to be fixed by chance. With few exceptions, the capital stock bears no relation to the size of the undertaking. The power to borrow money and to increase stock is usually guarded only in the vaguest and most general terms. The name of the company frequently contains the best available description of the route. Junctions, branches, and extensions are rarely well provided for. Provisions on rates are contained in only a small proportion of the earlier charters and generally wanting in those of later periods. Annual reports embracing from eight to one hundred and fifty or more items are prescribed, without adequate provisions for carrying out the intention of the law. With illustrations of this kind one might continue almost indefinitely. To present what the charters do not contain and wherein they differ would involve the writing of a treatise on railway legislation.

An analysis of our general laws reveals a similar state of affairs. We find there omissions, differences, inconsistencies essentially identical with those in the charters. The laws of a few of the states are relatively complete. The laws of others contain numerous admirable provisions. *But it is probably true that the laws of all the*

states taken collectively do not contain all the provisions essential for a complete railway law of to-day. In three-fourths of the states reports are called for which ought to furnish information sufficient for intelligent control; yet, who, by the terms of the charter, has power to verify these reports? Charters and laws require crossings to be left in good condition. During the earlier epochs, charters designated no one with power to enforce compliance with this provision, nor do the later charters generally do so. The commission laws have, however, in some instances, remedied this defect. Here and there provisions relating to sinking-funds and other wholesome financial arrangements appear in the charters, but their execution is left to the good will of the promoters. And when we recall that the same men frequently figured in a number of different projects involving, perhaps, millions of dollars, although the public had no assurance that these men could pay even their tailors promptly, the defects of such charters and laws are apparent.

It will add to whatever value this bird's-eye view of railway charters may possess, to consider a few of the chief characteristics of foreign railway charters. Inasmuch as charters and laws of more than a dozen countries reflect prominent features of foreign legislation, we may venture the statement that railway charters the world over have been constructed on the same plan. Their skeletons are everywhere alike. Taking their earliest shape in the turnpike and canal legislation of England before the era of railways had come, their first forms were generally preserved in both European and American states as well as in Japan. Various archaic features contained in the charters of to-day amply support this statement. One of the commonest and best

known among these survivals is the reservation, in so many charters of our states and of foreign countries, relating to the use of the railway track by different and, perhaps, competing transporters. A few American charters distinguish between "toll" and "transportation," charging, say, two cents for toll and three cents for transportation going from north to south, and two cents for toll and one cent for transportation going from south to north. The published legal schedules of France, to-day, separate the "right of toll" from the "price of transportation," so that a shipper who pays, say, a total of five francs freight charges, meets in that single payment two charges separately listed in the schedule, but practically constituting a single charge. The *droit de péage* represents the returns to the capital employed in construction and maintenance, while the *prix de transport* represents the remuneration of the rolling stock. This distinction in French law is theoretical, of course, and not observed by the public. Were several transporters to use the same track, it would doubtless have practical significance. The declaration of public utility, legally required in the early laws of a number of our states before a charter could be granted, is also retained in the French railway code of the present time. A considerable number of the earlier American charters contained preambles, a custom initiated in England and preserved both in its original and modified forms in other countries. The downfall, in America, of the custom of embodying a preamble in a railway charter removed the last vestige of restraint and was contemporaneous with the indiscriminate granting of charters by our legislatures. The preamble usually set forth the reasons why the project under consideration should be promoted, and upon the validity of the statements made in

the same, the charter was granted. The protracted parliamentary debates on the Liverpool–Manchester railway bill, centered about the preamble. In only a few of our states does the law require deliberations and hearings of a preliminary nature before a full charter is granted. In this lies one of the most serious defects of American railway charters, absence of provisions to guard against the chartering and construction of useless and harmful railways, which has repeatedly been discussed by men interested in railway affairs in all parts of the country. Something more comprehensive is needed than a bare provision prohibiting the building of parallel or competing lines—ridiculously defined in a number of charters and laws—within a specified term of years, found in many charters and nearly all the general laws of the states. Is it not possible that the practices prevailing in many foreign countries, requiring certain preliminary proceedings before a complete charter can be granted, may be of value to us? Japan seems to have embodied the results of foreign experience in a recent law with such elaboration as to deserve a moment's attention. According to Japanese law the railway franchise is separated into three distinct parts, the first of which may be completely separated from the two following. These three parts can be indicated by the terms preliminary, construction and operating charters. The preliminary charter is granted on the basis of a certain estimate which the franchise seekers must submit to the public authorities. It authorizes the projectors to make the necessary surveys and detailed estimates of costs upon the approval of which a permanent charter may be granted. After the road has been constructed, equipped, and duly inspected, an operating or business charter completes the granting of the fran-

chise. Without attempting to pass final judgment upon the Japanese scheme, is it not possible that the principles underlying the same may have some value for us? It would probably do away with much of the secrecy and underhanded work which so often accompanies the granting of charters in this country. Every step could in this manner be made public. The choice of a route, the character of the road, and the concessions made to the state could be thrown open to competitive companies, and a permanent charter granted to that organization which should offer to the public authorities the most advantageous conditions; and so on.

The preliminary charter under such or a similar system would take the place of that section of the old charters which empowers the company to enter upon lands for the purpose of making surveys and estimates. An indefinite number of competing persons and companies might secure this privilege, although in case of mere extensions of existing lines the situation would probably in many cases exclude all companies except the one in possession of the field. But there are many sections of our country in which the network of railways is still so far from complete that a better system of granting charters may be of great service in the future. The preliminary charter would accomplish much more than the old preambles could ever effect, because of the complete separation of the preliminary from the permanent grant of the franchise, which under the old system were accepted or rejected together. Before the construction charter could be issued, the public authorities would be in possession of one or more estimates of costs and probable income from traffic, together with the obligations which the respective companies are willing to

undertake in behalf of the state. There could be no blind play with respect to the route, for this would have to be described mile for mile from one terminus to the other. Complete maps and profiles would be publicly exhibited, and all the interests affected given an opportunity to be heard. Existing railways would be protected because no permanent charter could be granted until the usefulness of the projected road had been demonstrated, and its influence upon existing industries carefully considered. Having before them accurate estimates of costs, the amount of the capital stock could be intelligently fixed by both company and the public authorities. The hasty and feverish manner in which charters have so often been granted in the past could no longer prevail, to the incalculable benefit of both the railways and the public. The permanent charter would finally prescribe the organization of the company, route, amount of capital stock, and other individual and local matters which cannot prudently be incorporated in a uniform general law which, together with the special charter, would constitute the complete railway franchise.

Hand in hand with the suggested revision of our railway charters and the enactment of uniform general laws, must go a thorough recasting and unification of our present, almost indescribably chaotic, commission laws; if, indeed, these have not already been included in what has been said with respect to general railway laws. The writer does not forget that some of our laws, those of Massachusetts and of several other states, for instance, have already reached a high level of advancement, and if the railway legislation of all our states—especially that relating to the granting of charters—could be brought up to the Massachusetts level, a long step forward would have been taken; but if any one doubts the

justification of so emphatic an expression as "indescribably chaotic" let him spread out before his eyes a comparative exhibit of these laws and all uncertainty will be removed.

Another feature of foreign charters is the recognition, in railways, of different degrees of importance to the public, and an acknowledgement of these differences in the provisions of the charters and in the laws applying to them. Taking the general laws and charters of the United States as a whole, it may be asserted that the law places relatively unimportant local railways on the same footing with those which are most important. The charter of a trunk line may be an exact duplicate of that under which a line connecting several villages is operated. It is needless to add that a few exceptions, such as provisions relating to taxation, must be made. France, Italy, Switzerland, the countries of Germany, and England even, recognize in charters and laws a rational classification of railways based upon their relative degrees of importance. Would it not be profitable for American law-makers to consider the advisability of adopting one type of charters for local (perhaps intra-state) railways, and another type for those which go beyond the limits of one state? Would not a clearly defined division of functions in this respect between the federal and state governments lead to beneficial results? Could not the much needed uniformity among the several states be encouraged in some such way as this? Why should not a railway be authorized to do business under a local charter until it becomes a part of a greater system, and then cause it to comply with the provisions of a federal charter? The Interstate Commerce Law seems to suggest such a line of action.

The present lack of uniformity in both charters and general laws of the various states must be irritating and exasperating to those railways which make an attempt to comply with their provisions. What man of sound mind would expect to maintain his health and bodily vigor if he were to subject different parts of his body to different and opposite methods of treatment at the same time? Yet this is exactly what has been done and is being done to our railways through our checkered and many colored charters and laws. To those who believe that the time may come when public ownership will be a question of the day, this lack of uniformity and harmony in charters and laws has great practical significance, for it is difficult to see how an elaborate practical program can even be made out, not to speak of its execution, before substantial uniformity has been brought about. Our national and state commissions, both individually and in convention, have repeatedly emphasized the urgent need of uniformity in accounts, only the beginning traces of which are found in the charters and laws of several states. However, it is possible that practice has outstripped law in this respect, and that greater uniformity exists than is indicated in an analysis of legislation, special and general.

Another feature which obtrudes itself upon one's attention in an analysis of railway charters and laws, and which is largely the result of the chaotic condition of legislative enactments, is the lack of adequate administrative machinery. What if a charter *is* good? What if the general incorporation laws *are* strong? Who has the efficient power necessary to enforce compliance on part of the one against the ninety and nine railways that, perchance, would voluntarily meet all reasonable

requirements? It is said that in railway affairs the weakest may rule the strongest. One looks in vain for charter provisions which will make this impossible. It seems that legislators were loath to place discretionary powers in the hands of administrators, and as a result we have that long list of hard and rigid provisions relating to long and short hauls, pools, consolidations, rates, etc. In addition, we find similar provisions more or less comprehensive in their scope in the constitutions of three-fourths of the states, while in a few states the constitution contains practically all the railway legislation there is. Considering the nature of the railway business on the one hand, and the difficulty of amending constitutions on the other, is not the embodiment of railway clauses, beyond a few simple and general principles, in our state constitutions of doubtful utility? This lack of elasticity is a serious defect in our charters and laws, and is, perhaps, partly if not entirely the result of inadequate administrative machinery in which proper adaptive elements might have been incorporated.

Another lesson which foreign charters and laws may teach us lies in the protection of public interests and the representation of social and economic interests in the conduct of railways. With the exception of England, all the leading foreign countries provide ways and means by which every industry, trade, or profession may regularly exert influence in its own behalf. Prussia, Switzerland, and Japan provide for a system of advisory councils by law, and other countries have established similar representative organs through the agency of administrative orders. The existence of such councils in this country, reflecting the opinions and interests of all classes, would probably do much to overcome

that feeling of helplessness on part of an aggrieved public which one is likely to feel in a study of American railway charters. Both the railways and the public would be the gainers, because each would thus learn to understand the other through regularly constituted channels.

This paper does not primarily concern itself with the actual workings of the charters and laws, upon the analysis of which the generalizations here advanced rest. Given identical laws in different states and countries but different administrative bodies and methods, the practical effects may vary widely. French courts, for instance, have declared a crated plow baggage, and have absolved several merchants, who had been caught in a slight wreck and who had ordered a special train in order to reach on time a fair for which they were bound, from payment for this train. In the United States, courts refuse even the statements of facts made by our commissions. It is clear that the same laws in France and in the United States might bring about varying results.

The concluding paragraph of this paper may well be devoted to expressions of opinion of railway officials formulated in letters written by them. Communications received from over one hundred, relating to railway charters, show practical unanimity in the demand for uniformity. A tabulated analysis of railway charters and laws shows at a glance the utter lack of agreement among them, and it is a matter of satisfaction to be able to bring to the support of a student's conclusions the combined authority of leading railway men. One official suggests that the federal government grant charters, and that all applications for charters be referred to a non-political commission for examination.

Another asserts that stability and highest efficiency can never be obtained until all the great railways of the country have been placed under substantially a single organization, guided by one broad, general policy. Then, he thinks, discriminations and kindred evils will cease to be a necessity of the situation. Several emphasize the necessity of re-organizing railways under uniform general laws and of expressing all the provisions of the franchise clearly, and making them equally binding upon the companies and the public. Every point of importance should be fixed in the charter, and minimum as well as maximum rates should be established. Others emphasize the importance of prescribing by law all the physical conditions of a railway, and many deprecate the absence of legal provisions against the construction of railways for purposes of blackmail and speculation. A few point out the absence of statutes making legal and constitutional provisions effective. In short, aside from isolated cases, no opinions were expressed and no lines of action indicated by the railway men who touched upon the subject at all in their letters, which are not in substantial harmony with the conclusions suggested by an independent, objective analysis of existing railway charters and general laws.